

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

MON RIVER TOWING, INC.

Employer

and

UNITED MINE WORKERS OF AMERICA,
REGION 1, AFL-CIO, CLC

Petitioner

Case 6-RC-12695

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Mon River Towing, Inc., is engaged in the operation of towboats and barges on the navigable waters of the Allegheny, Monongahela, and Ohio Rivers where it employs approximately 57 deckhands and three engineers who work in crews on the river boats. The Petitioner, United Mine Workers of America, Region 1, AFL-CIO, CLC, filed a petition, as amended at the hearing, with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time deckhands and engineers employed by the Employer on its towboats and barges; excluding all office clerical employees, salespersons, captains, pilots¹ and guards, professional employees and supervisors as defined in the Act, and all other employees. A hearing officer of the Board held a hearing and the parties filed timely briefs with me, which have been duly considered.

As evidenced at the hearing and in the briefs, the parties disagree on the issue of whether a unit limited to the Employer's deckhands and engineers is appropriate. Contrary to

¹ The parties stipulated, and I find, that the captains and pilots are supervisors within the meaning of Section 2(11) of the Act based on their authority to independently discipline employees.

the Petitioner, the Employer initially asserts that the Employer and Consol Energy Sales, Inc., herein called CES, Inc., constitute a single employer. The Employer further contends that the only appropriate unit is one which encompasses the petitioned-for employees and certain land-based employees employed by CES, Inc. Specifically, the Employer asserts that the drivers, mechanics, technicians (landing and service) and watchmen employed by CES, Inc. at its landing operations in Speers, Pennsylvania; West End Landing, Pittsburgh, Pennsylvania; and West Elizabeth, Pennsylvania must be included in the unit found appropriate. The unit sought by the Petitioner has approximately 60 employees while the unit the Employer seeks would include approximately 81 employees.

The Petitioner is unwilling to proceed to an election in any unit other than the petitioned-for unit. The record indicates that in the 1950s or 1960s, the Petitioner represented certain employees of the Employer. However, for *at least* the past ten years, there has been no collective-bargaining representative of any of the employees at issue herein.

I have considered the evidence submitted by the parties on this issue. As discussed below, I have concluded that the Employer and CES, Inc. constitute a single employer. Notwithstanding this finding, I have concluded that the petitioned-for unit, a unit limited to deckhands and engineers employed by the Employer, is appropriate for the purposes of collective bargaining. Accordingly, I have directed an election in the unit set forth herein.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

The Employer is engaged in the operation of boats which haul barges of coal on the Allegheny, Monongahela and Ohio Rivers. In January 2006, the Employer was purchased by

CES, Inc.,² and since then, CES, Inc. has owned all of the stock of the Employer.³ The record reveals that the drivers, mechanics and watchmen were employed by the Employer at the time it was acquired by CES, Inc. After the acquisition, the employees in these job classifications were transferred to CES, Inc.

Michael Hennessey, Vice President of CES, Inc.'s River Operations Division⁴ is responsible for the overall operations of both the Employer's river boats and barges and the land-based functions carried out by CES, Inc. Hennessey works at the River Operations Division office in Monessen, Pennsylvania.⁵ Reporting to Hennessey are: General Manager of Operations and Logistics Michael Somales, General Manager, Maintenance Michael Hughes, and Chief Financial Officer Bill Sieler.

Michael Somales oversees the Employer's boating operations, including logistics, loads and customer needs. One of Somales' direct reports is Port Captain Eunice Radcliffe. The pilots and captains on the boats report to Radcliffe.⁶ The deckhands and engineers report directly to the captains and the pilots.

² CES, Inc. owns another subsidiary known as Twin Rivers Towing. Twin Rivers Towing also operates towboats and harbor boats on the three rivers where the Employer operates. The CES, Inc. employees at issue in this proceeding perform the same functions for both the Employer and Twin Rivers Towing. The deckhands employed by Twin Rivers have been represented for collective-bargaining purposes by the Seafarers International Union for more than 15 years.

³ CES, Inc. is a subsidiary of Consol Energy, Inc., a corporation engaged in coal mining operations, transportation and other ventures.

⁴ CES, Inc. is a sales company for Consol Energy, Inc. The River Operations Division is the division of CES, Inc. responsible for the operations of the Employer and Twin Rivers Towing as well as for the land-based operations at the landings.

⁵ The main office of CES, Inc. is located at Consol Parkway, in Canonsburg, Pennsylvania where the corporate headquarters of Consol Energy, Inc. is located.

⁶ Radcliffe is employed by CES, Inc. The record is not completely clear as to which entity employs the captains and the pilots.

The Employer currently operates four river boats and two harbor tugs.⁷ The river boats tow between one to fifteen barges of coal⁸ to various points in the Employer's areas of operation.⁹ Each of the river boats is manned by one captain, one pilot and four deckhands. On the larger vessels, the crew also includes an engineer. The crew works a 14-day on and a seven-day off schedule; meaning they board the vessel and travel on the river for 14 days, after which the crew is off for seven days.¹⁰ During the 14-day tour, each crew member works 12 hours per day in six-hour turns. Two deckhands work with the captain for six hours followed by a six-hour period where they are not working. After this, they work an additional six hours followed by another six hours when they are not working. The other two deckhands and the pilot work opposite the captain and the two deckhands. The harbor boats are manned by a captain or pilot and two deckhands. The crews on the harbor boats work 12-hour shifts after which they return home.

Deckhands are responsible for keeping the barges free of water and other hazards while they are being towed. If a barge has taken on water the deckhands pump the water out as the barges can easily sink. When arriving at a landing the deckhands prepare the barges, or tows, for delivery. This entails collecting rigging, steel cables, ratchets and the like from the barge. Deckhands also work in the engine room where they monitor oil and water levels and change filters if necessary. Engineers are part of the crew in larger boats or boats with greater maintenance demands, which the engineers are responsible for addressing.

⁷ The record indicates that CES, Inc. operates a total of 26 boats, three of which are leased and three of which are harbor tugs. As of the time of the hearing Twin Rivers Towing was operating one of the harbor tugs and two river boats.

⁸ The number of barges is determined by the size of the boat and the water level of the river.

⁹ The primary areas of operation are from Pittsburgh, Pennsylvania to Morgantown, West Virginia on the Monongahela River, from Pittsburgh to Freeport, Pennsylvania on the Allegheny River, and from Pittsburgh to milepost 162 on the Ohio River.

¹⁰ Two of the engineers work a 21-day on and 14-day off schedule. The third engineer works seven days on followed by seven days off.

Michael Hughes oversees the Speers, West End Pittsburgh and West Elizabeth landings, as well as the landings throughout the area. In this capacity, Hughes is also responsible for the maintenance of the boats and barges docked at these landings. One of Hughes' direct reports is Assistant Operating Manager Jim Conti who manages the Speers landing facility.

At Speers Landing, CES, Inc. has a facility where five mechanics, three service technicians, four full-time and one part-time watchmen and two drivers work.¹¹ The record shows that the functions of the land-based employees are fulfilled so that the boats on which the deckhands and engineers work remain operational. In general, the mechanics perform heavy maintenance and the service technicians perform preventative maintenance on the boats. The watchmen primarily work as helpers, delivering parts, assisting mechanics, removing garbage from boats and carrying supplies to the boats and assisting with the fueling of boats from the land.¹² The drivers pick up and transport crews and mechanics around the three rivers. There are communal areas at the Speers facility, including the training and safety room, a vending area and restrooms. The record establishes that deckhands and engineers often report for duty at this location at the beginning of their tour. If the assigned vessel is docked at Speers Landing, the crew will board the boat. Otherwise, the driver will transport the crew in a van to the location of the boat.

The West End Pittsburgh landing and the West Elizabeth landing are fleeting areas where barges are brought in by the towboats, are loaded or unloaded and may be stored for

¹¹ One of the watchmen also functions as a driver. The mechanics and watchmen report to George Brenzy. The service technicians report to Shane Hyde.

¹² There are no watchmen who work at the West End Landing or the West Elizabeth landing. The watchmen at Speers Landing carry no weapons, have no keys and receive no security training. They have no security responsibilities during the day shift, but are responsible for "fire watch" duties at night. The fire watch duties are described in the record as "keeping an eye on the equipment tied up at the landing." Although insignificant to my unit determination, based on the record before me, the watchmen are not guards for purposes of Section 9(b)(3) of the Act. See Petroleum Chemicals, Inc., 121 NLRB 630 (1958); Woodman Co., 119 NLRB 1784 (1958).

some period of time. On occasion, a deckhand or engineer will report for work at either of these landings to get to their assigned boat. Landing Superintendent Steve Haragas, one of Hughes' direct reports, oversees the West Elizabeth Landing. All of the landing technicians employed by CES, Inc. work either at West Elizabeth Landing or at West End Landing in Pittsburgh.¹³ These employees take care of the fleet of barges at these two landings, making sure that the lines are moved up and down as the river rises and falls. At times, the landing technicians will also assist deckhands in assembling the barges for tows, and separating or tying up the tows.

II. SINGLE EMPLOYER STATUS

As noted above, the Employer is a wholly-owned subsidiary of CES, Inc. CES, Inc., in turn, is one of the many subsidiaries owned by Consol Energy, Inc. The parties stipulated that the corporate officers and directors of CES, Inc. and the Employer are the same, and that all or some of these individuals are also corporate officers and directors of Consol Energy, Inc.¹⁴

Both the employees in the petitioned-for unit and the land-based employees of CES, Inc. River Operations Division ultimately report to Vice President Hennessey. Of course, many layers of supervision exist between the groups of employees at issue in this proceeding and Hennessey. The petitioned-for employees report to captains or pilots. The captains and pilots report to the Port Captain who in turn reports up the chain of command through Somales, who reports to Hennessey. The land-based employees report directly to Brenzy, Hyde or Harigas. Brenzy, Hyde and Harigas in turn report to Conti who reports up the chain of command through Hughes, who reports to Hennessey. All of the land-based supervisors as well as the river-based supervisors, beginning at least at the level of Port Captain, are employed by CES, Inc.

¹³ The record indicates that the Employer employs two individuals who perform landing technician duties one of whom works at West End Pittsburgh landing and the other of whom works at West Elizabeth landing.

¹⁴ The Petitioner submitted information regarding corporate officers and directors after the close of the hearing. I have not considered any of this information as it is not part of the record in this matter.

The record indicates that the boats and barges on which the Employer's deckhands and engineers work are registered to, and owned by, CES, Inc.¹⁵ All supplies, including tools, equipment, fuel, groceries and household items for the Employer's operation are purchased by CES, Inc. The employees of both entities are responsible for ensuring that the boats remain operational so that the barges can be towed to customers.

The Employer and CES, Inc. share an office in Monessen, Pennsylvania. The record reflects that all aspects of the CES, Inc. River Operations Division are carried out from this office. Both Vice President Hennessey and General Manager, Maintenance Hughes work at this office. The payroll and benefits administration for both the land-based and river-based employees are handled by one individual at this office.¹⁶ The hiring of new employees for both companies is handled by human resources personnel at the Monesson office.

The record establishes that most labor relations functions for both CES, Inc. and the Employer are handled by CES, Inc. at the corporate office in Canonsburg. New employees of both the Employer and CES, Inc. are provided with an employee handbook, which was created at the Monesson office with input from the corporate office of CES, Inc. The safety program known as "Absolute Zero" is administered by David Podrugul, an employee of CES, Inc.¹⁷

It is well established that in determining whether enterprises constitute a single employer, the controlling criteria are common management, centralized control of labor relations, interrelation of operations, and common ownership or financial control. Radio Union Local 1264 v. Broadcast Service, 380 U.S. 255, 256 (1965); South Prairie Construction Co. v. Operating Engineers, Local 627, 425 U.S. 800 (1976); Mercy Hospital of Buffalo, 336 NLRB

¹⁵ The boats operated by the Employer are identified with the logo "Consol Energy," which the Petitioner argues refers to Consol Energy, Inc., the parent umbrella.

¹⁶ CES, Inc. River Operations Division and the Employer have separate payroll accounts.

¹⁷ Absolute Zero is the safety program of Consol Energy, Inc. and is used by all employees of Consol Energy, Inc. and the employees of all other subsidiaries.

1282 (2001); Hydrolines, Inc., 305 NLRB 416 (1991). The Board has determined that no single criterion is controlling, although it considers the first three, which evidence operational integration, more critical than the fourth, common ownership. Parklane Hosiery Co., 203 NLRB 597, 612 (1973). Further, all of these criteria need not be present in order to establish that the entities constitute a single enterprise. The Arundel Corporation, 252 NLRB 397, 399 (1980).

In the instant case, the record affirmatively establishes the common ownership and common management of the two entities involved. Consol Energy, Inc. is the sole shareholder of CES, Inc., which in turn is the sole owner of the Employer. The two companies share common officers and directors. In addition, the day-to day operations of both entities are managed by CES, Inc. personnel.

There is also substantial evidence to suggest a high degree of integration in the operations of the two entities involved herein. In this regard, I note that various administrative functions, including labor relations, payroll and administration of various employee benefits including health insurance, are centrally handled by the CES, Inc. personnel at the Monessen office. In addition, the boats used by the Employer are registered to CES, Inc. and all equipment and supplies for the Employer's operation are purchased by CES, Inc. Finally, the employees of both entities have a common objective in their work, which is to keep the boats operating on the rivers.

The hiring of the Employer's deckhands and engineers is done through the human resources personnel at the Monesson office. The employees of both CES, Inc. and the Employer utilize the same employee handbook. There is no evidence in the record that the Employer exerted independent control over its labor relations and human resources function. Thus, the record supports the finding that there is centralized control over the labor relations.

In view of my determination that there is common ownership, common management, substantial integration of operations and centralized control over the labor relations of CES, Inc. and the Employer, I conclude that these entities constitute a single employer.

III. SCOPE OF THE UNIT

Having found that the Employer and CES, Inc. constitute a single employer, the next issue to be resolved is whether the employees in the unit sought by the Employer share such a strong community of interest with the employees in the petitioned-for unit so as mandate their inclusion in the that unit. It is well established that even where two or more businesses are found to constitute a single employer, a separate question exists as to whether an overall unit is appropriate for collective-bargaining purposes. South Prairie Construction Co., supra. In other words, a finding of single employer status does not in itself mean that the employees of both entities composing the single employer will be included in a single bargaining unit. Lawson Mardon U.S.A., 332 NLRB 1282 (2000); citing Edenwald Construction Co., 294 NLRB 297 (1989). Consideration of the scope of the unit examines employees' community of interest. Peter Kiewit Sons' Co., 231 NLRB 76 (1977) The traditional community of interest criteria considered by the Board are the degree of functional integration, common supervision, employee skills, interchangeability, contact among employees, fringe benefits and other terms and conditions of employment and bargaining history. Aerospace Corp., 331 NLRB 561(2000), citing Kalamazoo Paper Box Co., 136 NLRB 134 (1962).

The Board discussed its principles regarding appropriate units at length in Overnite Transportation Co., 322 NLRB 723 (1996). The Board stated that it is well settled that employees of an employer may be appropriately grouped in more than one way for the purposes of collective bargaining, and that the Board's policy is to consider first whether the petitioned-for unit is appropriate. "There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act only requires that the unit be 'appropriate.'" Overnite Transportation Co., supra, quoting Morand Bros. Beverage Co., 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951). A union is not required to seek the largest or most comprehensive grouping of employees, so long as the unit requested is an appropriate one. Overnite Transportation Co.,

supra. Thus, the Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. If that unit is appropriate, then the inquiry ends there. Bartlett Collins Co., 334 NLRB 484 (2001). See Dezcon, Inc., 295 NLRB 109, 111 (1989). In addition, although not controlling, the unit sought by the Petitioner is always a relevant consideration. Overnite Transportation Co., supra.

The record establishes that the deckhands and engineers have different working conditions than the land-based employees who work at the three landings the Employer has identified in the unit it contends should be found appropriate. As noted previously, the river boat deckhands work a 14-day on and seven-day off work schedule. Thus, when deckhands report to work for a tour, they do not return home for 14 days. Two of the three engineers work a 21-day on and 21-day off work schedule. The third engineer works seven days on followed by seven days off. Both deckhands and engineers work 12 hours per day and these hours are split into two six-hour shifts.

Deckhands are paid a daily rate of between \$148 and \$160 per day for every day they spend on the river. The deckhands who work on the harbor boats also work a 12-hour shift and are paid the same daily rate. The engineers earn between \$193 and \$208 per day for every day they spend on the river. Although some confusion exists, it appears that based on the record, deckhands and engineers do not receive overtime pay after they have worked 40 hours in a week. Instead, the deckhands receive overtime if they work more than 12 hours in a 24-hour period. The captain of the boat completes the timesheets, including any overtime calculation for the deckhands and engineers. The land-based employees manually complete time cards.

The drivers, watchmen, mechanics and landing technicians are hourly paid employees and work eight-hour shifts.¹⁸ These employees are paid overtime if they work more than 40 hours per week. The service technicians are salaried employees.¹⁹ Drivers generally work

¹⁸ The drivers and the watchmen earn between \$11 and \$12 per hour. Landing technicians earn \$14 to \$15 per hour. The mechanics earn \$21 to \$22 per hour.

¹⁹ The record indicates that the service technicians are salaried, and at least one service technician is paid \$50,000 per year.

Monday through Friday, from 7:30 a.m. to 4:00 p.m. Service technicians also work from 7:30 a.m. to 4:00 p.m., and are subject to periodic callouts. Mechanics work staggered eight-hour shifts between 8:00 a.m. and 11:00 p.m. The mechanics can be called out after their work hours, if necessary.

The river-based employees and land-based employees do not share uniform benefits. The land-based employees employed by CES, Inc. participate in Consol Energy, Inc.'s pension plan and can also contribute to the 401(k) plan. The employees in the petitioned-for unit do not participate in the pension plan, but can contribute to the 401(k) plan. The employees of CES, Inc. have long term and short term disability plans. The petitioned for employees do not share in these benefits. Rather, the Employer provides them five sick days per year. Unlike the CES, Inc. employees, the deckhands and engineers in the petitioned-for unit cannot file state worker compensation claims in case of an on-the-job injury. Rather, the employees in the petitioned-for unit are covered by the Jones Act, a Federal law governing the workers compensation rights of seamen.

The record establishes that the petitioned-for employees as well as the land-based employees receive health insurance through Consol Energy, Inc. Both groups have the same entitlement to vacation pay based on their years of service. In addition, both groups of employees can receive a quarterly safety bonus, which is a percentage of their pay, based on hours worked in a quarter. However, the record reveals that land-based employees are grouped separately from the deckhands and engineers for purposes of determining whether the safety bonus will be paid. Thus, if a land-based employee is injured at work, all of the land-based employees are ineligible for the safety bonus, whereas the deckhands' and engineers' eligibility for a safety bonus is unaffected.

Service technicians, mechanics, drivers and watchmen wear a blue uniform with a reflective, or fluorescent, stripe on the side of the pant leg. The uniform shirt also has a name patch. CES, Inc. provides several sets of uniforms for these employees, which are replaced as needed. The record indicates that CES, Inc.'s landing technicians do not wear uniforms. The

deckhands and engineers in the petitioned-for unit do not wear uniforms. These employees wear jeans, long sleeved shirts, vests, work gloves and steel toed shoes. They are also required to wear a cap with a visor, such as a baseball cap.

The record establishes that the operation of the Employer and CES, Inc. is integrated such that the CES, Inc. employees spend a portion of their time in furtherance of the Employer's operation.²⁰ Mechanics and service technicians maintain the boats which are operated by the Employer's crews. The landing technicians handle the barges which are towed behind the boats. The drivers and watchmen support the Employer's operation by driving crews and maintenance personnel to and from landings, and by assisting with stocking the boats with supplies and removing trash.

With respect to transfer of employees, the record reveals that CES, Inc. does not permit deckhands and engineers to bid or transfer to land-based positions, and that a separate seniority list of deckhands is maintained. Notwithstanding, the Employer asserts in its brief that most of its landing technicians started out as deckhands. The specific examples in the record were of Steve Harigas, Jim Schultis, Corry Miller, Denny O'Malley, Bob Jaskolski and John Buggy. The record reveals that Harigas, Schultis, Miller, Jaskolski and Buggy were formerly employed as deckhands by Twin Rivers Towing. O'Malley was formerly employed as a deckhand by Tri-River Towing Company, a company taken over by the Employer at some point apparently after O'Malley became a landing technician. As of the date of the acquisition of the Employer by CES, Inc., O'Malley was working as a landing technician and he has continued to work in that position. The record contains no evidence that any deckhand employed by the Employer has become a landing technician of CES, Inc. In addition, those deckhands who were previously employed by other companies and who became landing technicians have never temporarily filled in for the deckhands in the petitioned-for unit.

²⁰ The record establishes that the land-based employees divide their time between performing their duties for the Employer and Twin Rivers Towing.

Most of the contact between river crews and the land-based employees takes place during those limited times when the deckhands and engineers are not on a river tour and are not off duty for a seven or more day period. For instance, landing technicians interact with the deckhands during and after the delivery of barges. Specifically, landing technicians help the deckhands assemble the tows when they are getting ready for a tour and they also assist in separating the barges when the crew returns. The watchmen also interact with deckhands in the fueling process in that watchmen handle the fuel pump on the land side of the process and may assist in carrying the fuel hose toward the boat. The deckhand couples the fuel hose to the side of the boat through a manifold and fuels the boat. The record establishes that each vessel is fueled 1 to 2 times per week, and while the process is taking place, the deckhand is on the boat and the watchman is on land. In cases when a boat has been docked at the Speers Landing for repairs, the deckhands have stayed on the boat to paint the boat.

As stated previously, the watchmen and drivers deliver supplies to the boat and remove garbage. During this process, they may interact with the crew members. When arriving for a tour, deckhands also help drivers load the trailer which is then towed behind the van. The trailers are loaded with groceries, water and other equipment and taken to the arrival point with the crew. Drivers will also be dispatched if a crew member must leave the tour due to an emergency. The record indicates that drivers spend at least half of their time driving. Because of the 14-day on and seven day off schedule, deckhands may only report to the Speers Landing every 2 to 3 weeks.

With respect to contact between the groups of employees during the course of a river tour, the record indicates that mechanics have contact with deckhands and engineers when a repair is required while the boat is operating. In these cases, the mechanics will meet the boat at a particular landing. Upon boarding the boat, the mechanic will contact the captain who may direct the deckhand to explain the problem to the mechanic. Mechanics can be aboard the boat for anywhere from 10 minutes to several hours. On one occasion, a mechanic had to sleep in the galley for one night due to a delay in getting a repair part. If a service technician is needed

on a boat while the boat is moving, the service technician will drive to a landing to board. At that point, the deckhand will drive the service technician's vehicle to the next lock or landing where the two can switch. The service technician is generally needed on a boat for a shorter period of time than a mechanic in that the mechanics perform the heavier maintenance.

At times, the deckhands have performed some duties that a service technician can perform. For example, deckhands have changed fuel filters, checked the oil and adjusted the seal packing while the boat is in operation. These are duties performed by a service technician when the boat is docked.

The record contains some evidence of limited instances of temporary interchange. Specifically, within the six-months prior to the hearing, engineers Charles Dick and Fred Johnson filled in as landing employees for a period of a few days while the boats they were assigned to were tied up. There is also evidence that deckhand Steve McKenna filled in as a watchman for 3 to 4 days due to a vacancy created by a watchman's illness or vacation. The record establishes that no land-based employee has ever filled in for a deckhand or other crew member.

Although the Employer and CES, Inc. have centralized administrative functions, including centralized employment and administration of benefits, it is clear that the Employer's employees have separate daily supervision. The deckhands and engineers report for their tours and are under the sole authority and direction of the boat captains or pilots.

Certain significant differences exist between the benefits enjoyed by the Employer's employees and those enjoyed by the CES, Inc. employees. The Employer's employees do not participate in the pension plan in which the CES, Inc. employees participate, nor do they have long-term disability or short-term disability coverage. The petitioned-for employees are separately grouped on their own seniority lists. They also comprise a separate group for purposes of the quarterly safety bonus.

The river-based employees, including those working on harbor tugs, work 12 hours per day in two six-hour shifts as opposed to working the eight-hour shifts of the land-based

employees. In addition, the employees who work on the rivers work on tours where they leave home for periods of between seven and 21 days at a time. The river-based employees' eligibility for overtime pay is also different than that of the land-based employees. The river-based are eligible for overtime when they work more than 12 hours per day, whereas the land-based employees are eligible for overtime after they work more than 40 hours in a week. The petitioned-for employees do not wear the employer-provided uniform that the majority of the land-based employees of CES, Inc. wear.

The primary work environment for the petitioned-for employees is on the vessel, whether that be a river boat or harbor tug. In the case of the river boat crews, they eat, sleep and live on the boat while they are working. Although not fully described in the record, working on boats with barges on the rivers while passing through locks requires experience and skills different from the mechanics, watchmen, drivers and technicians (service and landing) who are land-based or who work with barges in a fleeting area. I recognize that service technicians and mechanics work on the boats for periods ranging from ten minutes to two hours at a landing or while the boat is traveling. These employees work on several boats per day. When not on the boats, they are traveling between landings.

Permanent interchange between the Employer's deckhands and engineers and the land based employees is nonexistent. Temporary interchange by river-based employees for land based employees has been minimal, while temporary interchange by land-based for river-based employees have not occurred.

Although the more comprehensive unit proposed by the Employer may also be appropriate for bargaining purposes, the record does not establish that the employees of CES, Inc. possess such a substantial community of interest with the Employer's employees to compel or mandate their inclusion in the unit. Engineered Storage Products Co., 334 NLRB 1063 (2001); Bartlett Collins Co., 334 NLRB 484, 485 (2001). In this regard, I note the Employer's assertion that Chatham Towing Co., Inc., 226 NLRB 502 (1976) "squarely" addresses the unit issue in this matter is overstated. In Chatham Towing, a single-employer finding was made

between the towing company and the parent company, Colonial Oil. In determining that the appropriate unit could not be limited to the one deckhand and two tankermen employed by the towing company, the Board noted that 85 percent of the towing company's operations took place locally in the Savannah Harbor. Only 15 percent of their operations involved long haul deliveries with a 36-hour round trip outside the harbor. In addition, the shore based employees worked with the petitioned-for employees on average one full day per week. Moreover, shore-based employees worked as deckhands twice per week for a three-to-four-hour period and full time for a six-week period in the summer. Finally, the seniority obtained in either company was portable to the other. Likewise, a key element in the Board's decision in Halliburton Company, 142 NLRB 644 (1963), was the substantial amount of interchange of personnel, particularly between mechanics assigned to the shops on the land and boat mechanics, and land-based cementers and cementers in boat crews.

Based on the record evidence and having carefully considered the arguments of the parties, I have concluded that the community of interest between the river-based employees and the land-based employees is not so substantial as to render inappropriate the unit sought by the Petitioner. In the instant case, river-based employees have separate day to day supervision. These employees work on the river two to three weeks at a time, after which they are off duty and off site for seven days. The record establishes incidental contact between the land-based and river-based employees primarily at the beginning or conclusion of a river tour, such as when they are being driven to a landing, fueling a boat or tying or separating barges. The record does not indicate that river-based employees are assigned to work with land-based employees on an extended or long term basis. Moreover, none of the land-based employees work as deckhands, and a separate seniority list for deckhands is maintained. The three instances of a deckhand and two engineers filling in for land-based employees appear to be infrequent and isolated events. In sum, the record establishes that the deckhands and engineers have a community of interest separate from the other classifications sought by the

Employer. Accordingly, I find that a unit limited to the petitioned-for employees working on the Employer's towboats and barges is an appropriate unit.

IV. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees²¹ of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time deckhands and engineers employed by the Employer on its towboats and barges operating on the Monongahela, Allegheny and Ohio Rivers; excluding all salespersons, office clerical employees and guards, professional employees and supervisors, as defined in the Act, and all other employees.

²¹ The record establishes that approximately eight months ago, a number of deckhands and engineers employed by the Employer were laid off. The record also establishes that in August 2009 an unknown number of employees who had been laid off were recalled for a limited period of time, after which they were again laid off. Based on the record, I cannot determine their eligibility to vote in the election directed herein. Therefore, I will allow those deckhands and engineers who were laid off at any time beginning February 1, 2009, and who have not been recalled as of the pay period preceding the issuance of this Decision, to vote subject to challenge. Accordingly, the Employer is instructed to create a separate section on the Excelsior list with the names of these voters and their addresses.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Mine Workers of America, Region 1, AFL-CIO, CLC. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior

Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, William S. Moorhead Federal Building, 1000 Liberty Avenue, Room 904, Pittsburgh, PA 15222, on or before November 6, 2009. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the

election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001.²² This request must be received by the Board in Washington by 5 p.m., EST (EDT), on November 13, 2009. The request may **not** be filed by facsimile.

Dated: October 30, 2009

/s/Robert W. Chester

Robert W. Chester, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
William S. Moorhead Federal Building
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222

Classification Index

420-2901
440-1760-0100
440-1760-8600
440-3350-2500

²² A request for review may be filed electronically with the Board in Washington, D.C. The requirements and guidelines concerning such electronic filings may be found in the related attachment supplied with the Regional Office's initial correspondence and at the National Labor Relations Board's website, www.nlrb.gov, under "E-Gov." On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-Filing instructions explaining how to file the documents electronically will be displayed.